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Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1988

No. _____

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
PETITIONER

vs.

THE WEST VIRGINIA DEPARTMENT
OF HIGHWAYS,
a corporation,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

A. Where insurance coverage exists, is the State of West Virginia a real party in interest to an extent that any action in federal court against the state would be barred by the Eleventh Amendment to the Constitution of the United States?

B. Has the Department of Highways of the State of West Virginia waived the defense of sovereign immunity in this case?

B.1. Has the State of West Virginia by statute, waived the defense of sovereign immunity to the extent that any claims for which it may be held liable are covered by insurance?

B.2. Has the State of West Virginia contracted with its insurance carrier to pay for all damages incurred as a result of the judgment rendered in this case and thereby waived its sovereign immunity?

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RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RELIEF REQUESTED

Westinghouse Electric Corporation petitions for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered on May 2, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, appearing, Infra, Appendix, Page 2-A, rendered on May 2, 1988, is reported in 845 F.2d 468.

The Memorandum Opinion and Order of the United States District Court for the Southern District of West Virginia, appearing, Inra, Appendix, Page 6-A, is not reported.

STATEMENT OF JURISDICTION

Judgement affirming the ruling of the United States District Court for the Southern District of West Virginia by the United States Court of Appeals for the Fourth Circuit was entered on May 2, 1988.

Petitioner is unaware of any cross-petitions to be filed in this case.

Jurisdiction in this Court is based upon 28 U.S.C. §1254.

CITATION OF CONSTITUTIONAL PROVISIONS AND STATUTES

A. Eleventh Amendment to the Constitution of the United States.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

B. Chapter 29, Article 12, Section 5, West Virginia Code (1957)

§29-12-5 *Powers and duties of board.*

The board shall have general supervision and control over the insurance of all state property, activities and responsibilities, including the acquisition and cancellation thereof; determination of amount and kind of coverage, included [including] but not limited to deductible forms of insurance coverage, inspections or examinations relating thereto, reinsurance, and any and all matters, factors and considerations entering into negotiations for advantageous rates on and coverrage of all such state property, activities and responsibilities. Any policy of insurance purchased or contracted for by the board shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits. The board may enter into any contracts necessary to the execution of the powers granted to it by this article. It shall endeavor to secure the maximum of protection against loss, damage or liability to state property and on account of state activities and responsibilities by proper and adequate insurance coverage through the introduction and employment of sound and accepted methods of protection and principles of insurance. It is empowered and directed to make a complete survey of all presently owned and subsequently acquired state property subject to insurance coverage by any form of insurance, which survey shall include and reflect inspections, appraisals, exposures, fire hazards, construction, and any other objectives or factors affecting or which might affect the insurance protection and coverage required. It shall keep itself currently informed on new and continuing state activities and responsibilities within the insurance coverage herein contemplated. The board shall work closely in cooperation with the state fire marshal's office in applying the rules and regulations

of that office insofar as the appropriations and other factors peculiar to state property will permit. The board is given power and authority to make rules and regulations governing its functions and operations and the procurement of state insurance, but shall not make or promulgate any rules or regulations in contravention of or inconsistent with the laws or rules and regulations governing the office of insurance commissioner of West Virginia

The board is hereby authorized and empowered to negotiate and effect settlement of any and all insurance claims arising on or incident to losses of and damages to state properties, activities and responsibilities hereunder and shall have authority to execute and deliver proper releases of all such claims when settled. The board may adopt rules and procedures for handling, negotiating and settlement of all such claims. All such settlements and releases shall be effected with the knowledge and consent of the attorney general. (1957, c.96.)

C. Chapter 33, Article 6, Section 14a, West Virginia Code (1967)

§33-6-14a. *Public liability insurance policies issued to charitable associations, governmental units, etc., to contain provision for waiving of charitable or governmental immunity defense.*

No policy or contract or public liability insurance providing coverage for public liability shall be sold, issued, or delivered in this State to any religious or charitable corporation or association, either directly or to the trustees of such associations, or sold, issued or delivered to any governmental unit, agency or subdivision, unless it shall contain a provision or endorsement whereby the company issuing such policy waives, or agrees not assert as a defense, on behalf of the policyholder or any beneficiary thereof, to any claim covered by the terms of such policy within the policy limits, the immunity from liability of the insured by reason of such insured's charitable or governmental status, unless such provision or endorsement is rejected in writing by the named insured. (1967, c.95)

D. Chapter 33, Article 6, Section 14a, West Virginia Code (1986)

§33-6-14a, *Public liability insurance policies issued to charitable associations to contain provision for waiving of charitable immunity defense.*

Any policy or contract of public liability insurance providing coverage for public liability sold, issued, or delivered in this state to any religious or charitable corporation or association, either directly or to the trustees of such associations, shall be read so as to contain a provision or endorsement wherby the company issuing such policy waives, or agrees not to assert as a defense, on behalf of the policy holder or any beneficiary thereof, to any claim covered by the terms of such policy within the policy limits, the immunity from liability of the insured by reason of such insured's charitable status, unless such provision or endorsement is rejected in writing by the named insured. (1967, c. 95; 1985, c. 105; 1986, 1st Ex. Sess., c. 24.)

STATEMENT OF FACTS

A. The underlying tort claims.

On or about December 8, 1983, a truck owned and operated by Westinghouse Electric Corporation (hereinafter "Westinghouse") was involved in an accident on the West Virginia Turnpike, which was owned and operated by the West Virginia Department of Highways (hereinafter "Department"), with a truck driven by one Sans C. Shields in which Norman E. Sartorious was a passenger. As a result of the collision Shields and Sartorious brought separate suits in the United States District Court for the Southern District of West Virginia against Westinghouse. Westinghouse filed third-party complaints against the Department alleging, **inter alia**, the roadway upon which the Westinghouse vehicle was traveling at the time of the accident was improperly and inadequately marked and as such mislead and confused the Westinghouse driver, thereby causing or contributing to the accident.

At the time of the accident, the Department was covered by public liability insurance with CNA Insurance which provided coverage for the claims of Westinghouse.

Westinghouse settled the case with Shields and Sartorious and proceeded to trial on the third-party claims against the Department. Prior to the introduction of any evidence the Department, orally at first and later in writing, moved that the action be dismissed for lack of subject matter jurisdiction after previously advising the District Court and Westinghouse that the defense of the Eleventh Amendment would not be raised. The

Court took the motion under advisement. The case was tried before the Court and a jury on March 25 and 26, 1986, resulting in a finding by the jury that the Department was 85% responsible for the accident and Westinghouse was 15% responsible.

Judgement was entered on the verdict on April 4, 1986.

In its Order of June 8, 1987, granting the Department's Motion to Dismiss for lack of subject matter jurisdiction, the District Court found that:

> Westinghouse proves a general waiver of sovereign immunity and reasons that because the general waiver is not limited to just State Courts it unequivocally points to a waiver of immunity to suit in Federal Court as well.

The Court also concluded:

> Westinghouse, upon discovery for the purposes of this motion, reveals that West Virginia has without exception paid claims not exceeding $500,000, such as the claim involved here, that it entered into a contract with its insurance company by which the insurance company agrees not to raise defenses based upon the State of West Virginia's governmental status' and for the purpose of this motion, the Court assumes that the State of West Virginia has already paid over to its insurance carrier a reserve to cover losses anticipated from this action.

Thereafter, Westinghouse appealed to the United States Court of Appeals for the Fourth Circuit. Following the filing of briefs, oral argument was heard on March 11, 1988. In its opinion of May 2, 1988, the Fourth Circuit Court of Appeals affirmed the District Court's ruling that Westinghouse had proven a general waiver of sovereign immunity but failed to prove a waiver of immunity to suite in Federal Court. *Westinghouse Electric Corporation v. The West Virginia Department of Highways*, 845 F.2d 468 (C.A. 4th Cir. 1988)

B. *Applicable W. Va. Insurance Statutes.*

West Virginia Code §29-12-5 provides **inter alia:**

> Any policy or insurance purchased or contracted for by the [State Board of Insurance of West Virginia] shall provide that the insuror shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits.

At the time of the accident involved in this action West Virginia Code §33-6-14a provided:

> No policy or contract of public liability insurance providing coverage for public liability shall be . . .sold, issued or delivered to any governmental unit, agency or subdivision, **unless it shall contain a provision or endorsement whereby the company issuing such policy waives, or agrees not to assert as a defense, on behalf of the policyholder or any beneficiary thereof, to any claim covered by the terms of such policy limits, the immunity from liability of the insured by reason of such insured's. . . governmental status, unless such provision or endorsement is rejected in writing by the named insured.** (Emphasis added)

C. *State Insurance Policy Language.*

There was a policy of insurance applicable to the claims of Westinghouse which reads in pertinent part as follows:

> The Company shall not assert as a defense, on behalf of an insured, to any claim covered by the terms of the policy limits, the immunity from liability of the insured by reason of such insured's governmental status.

STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

The original plaintiffs in the underlying tort claim, to-wit: Shields and Sartorious, initiated two actions in the U.S. District Court for the Southern District of West Virginia based upon diversity of citizenship under 25 U.S.C. §1331.

Pursuant to Rule 14 of the Federal Rules of Civil Procedure, Westinghouse filed its Third-Party Complaint against the Department.

ARGUMENT

A. WHERE INSURANCE COVERAGE EXISTS, THE STATE OF WEST VIRGINIA IS NOT A REAL PARTY IN INTEREST TO THE EXTENT THAT ANY ACTION IN FEDERAL COURT AGAINST THE STATE WOULD BE BARRED BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In reviewing the United States Supreme Court cases it clearly appears **that at no time was the existence of insurance coverage**

ever a factor considered by the Supreme Court. This fact cannot be ignored since it goes to the very basis of Eleventh Amendment immunity. If the liability will not directly impact the public funds, then the suit is not against the State but is actually against the insurance carrier. "Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 673, 39 L.Ed.2d 662, 663, 94 S.Ct. 1347, ___ (1974).

> As to what is to be deemed a suit against a State..., it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record. *Ex Parte State of New York*, 256 U.S. 490, 500, 65 L.E. 1057, ___ , 415 S.Ct. 588, ___ (1921), Citations omitted.

"...[T]he general criterion for determining when a suit is in fact against the sovereign is the **effect** of the relief sought." *Penhurst State School and Hospital v. Halderman*, 465 U.S. 89, ___ 79, L.Ed. 67, 83, 104 S.Ct. 900, __ (1984). Emphasis in original.

The judgment entered by the District Court in the present case was within the coverage provided by the Department's insurance carrier. Thus, the Eleventh Amendment is not triggered since any recovery by Westinghouse Electric Corporation will not affect public funds. See *Pittsburgh Elevator Company, vs. West Virginia Board of Regents*, 310 S.E. 2d 675 (W. Va. 1985).

B. THE DEPARTMENT OF HIGHWAYS OF THE STATE OF WEST VIRGINIA HAS WAIVED THE DEFENSE OF SOVEREIGN IMMUNITY IN THIS CASE

It is clear and well established that a State may waive its immunity from suit in Federal Court granted to it by the Eleventh Amendment to the Constitution of the United States. "[I]t is well established that a state may consent to Federal suit and submit to the exercise of federal jurisdiction over it." *Employees vs Department of Public Health and Welfare, State of Missouri*, 411 U.S. 279, 294, 36 L. Ed. 2d 251, 262, 93 S.Ct. 1614 (1973). "A sovereign's immunity may be waived, and the Court consistently has held that a state may consent to suit against it in Federal Court." *Penhurst State School vs. Halderman*, 465 U.S. 89, 79 L. Ed. 2d 67, 77, 104 S.Ct. 900 (1984). "There are, however, certain well estab-

lished exceptions to the reach of the Eleventh Amendment. For example, if a state waives its immunity and consents to suit in Federal Court, the Eleventh Amendment does not bar the action." *Atascadero vs. Scanlon*, 473 U.S. 296, 87 L. Ed. 2d 171, 177, 105 S.Ct. 3142 (1985).

The test to determine whether or not a state has waived its Eleventh Amendment immunity was most recently expressed in *Atascadero*, 473 U.S. 296, 87 L. Ed. 2d 171, 177 n.1, 105 S.Ct. 3142, n.1 (1985).

> A state may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program. In each of these situations, we require an unequivocal indication that the state intends to consent to Federal jurisdiction that otherwise would be barred by the Eleventh Amendment.

The Court went on to emphasize in its opinion in *Atascadero* that the state will be deemed to have waived its immunity "only when stated by the most express language **or by such overwhelming implication from the text as will leave no room for any other reasonable construction.**" (Emphasis added).

A State may waive its Eleventh Amendment immunity in several ways. If a State voluntarily enters into a situation, such as a federally regulated activity, with full knowledge of possible exposure to liability, it has effectively waived its Eleventh Amendment defense of sovereign immunity. "[The Court's] conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the [Federal Employer's Liability Act (45 USC § § 51-500)], necessarily consented to such suit as was authorized by that Act." *Parden v. Terminal Railway*, 377 U.S. 184, at 92, 12 L. Ed. 2d 233, at 240, 84 S.Ct. 1207 reh. den. 377 U.S. 1010, 12 L. Ed. 2d 1057, 84 S.Ct. 1903 (1964). "...[W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as full as if it were a private person or corporation." *Parden*, supra., 377 U.S. at 196, 12 L. Ed. 2d at 242, 84 S.Ct. at _____. The *Parden* case has been used as a standard of a State's waiver of its Eleventh Amendment defense of sovereign immunity." [*Parden vs. Terminal Railway Company*] approaches, on the facts of that case, the outer limits of the

sort of voluntary choice which we generally associate with the concept of constitutional waiver." *Employees vs. Department of Public Health and Welfare, State of Missouri*, 411 U.S. 279, at 296, 36 L. Ed. 2d 251, at 263, 93 S.Ct. 1614 (1973). Thus, a State may waive its Eleventh Amendment defense of sovereign immunity by having knowledge of the circumstances. "When the Court in 1793 held that a State could be sued in the federal courts by a citizen of another State . . ., the Eleventh Amendment was passed precluding it. But this is an immunity which a State may waive at its pleasure as by a general appearance in litigation in a federal court or by statute." See *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, at 276, 3L. Ed. 2d 804, at 807, 79 S.Ct. 785 (1959). If a State, which has been made a defendant to an action in a federal court, reaches a settlement with the plaintiff, the State has waived its Eleventh Amendment immunity. *Jordan v. Fusari*, 496 F. 2d 646 (C. A. 2d Cir. 1974).

All of the United States Supreme Court cases reviewed by Petitioner are distinguishable from the present case in that **insurance was never a factor** considered by the Court in reaching its decision. The existence of insurance strikes to the very basis of the immunity granted by the Eleventh Amendment. The United States Supreme Court recognized that one of the reasons for the adoption of the Eleventh Amendment was financially motivated.

> When Chisolm dared to sue the 'sovereign state' of Georgia, all the states were so indignant that Congress moved with vehement speed to prevent subsequent affronts to the dignity of states. More than dignity of a sovereign state was probably at issue, however. When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts. The states could therefore use the new amendment not only in defense of theoretical sovereignty but also in a more practical way to forestall suits by individual creditors! Irish and Prothro, The Politics of American Democracy (1959), p. 123, as quoted in *Petty v. Tennessee-Missouri-Bridge Com.*, 359 U.S. 275, 3 L. Ed. 2d 804, n.1., 79 S.Ct. 785 (1959).

In the case of *West v. Keve*, 571 F.2d 158 (C.A. 3rd Cir. 1978), the United States Court of Appeals for the Third Circuit recognized that the existence of insurance is a factor which must be considered in determining whether or not a State has waived its Eleventh Amendment immunity.

"A State may waive its Eleventh Amendment immunity, *Edelman*, supra, 415 U.S. at 673, 94 S.Ct. 1347, and plaintiff contends that Delaware has done so by enactment of Del. Code tit. 18 § 6511 (1974), which provides:

'§ 6511. Defense of sovereignty prohibited.

The defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate.'

In *Kardon v. Hall*, 406 F. Supp. 4 (D.Del. 1975), the only case discussing whether § 6511 constitutes a waiver of the Eleventh Amendment, the court held that this statute waives only sovereign immunity against suit in state court but not Eleventh Amendment immunity against suit in federal court. Although the Delaware statutory scheme does not specify the procedure to be used in suing the state nor provide that the state courts have exclusive jurisdiction in such suits, the court in *Kardon* reached its conclusion by interpreting the statute narrowly in reliance on *Edelman's* statement that waiver will be found "only were stated' by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman, supra*, 415 U.S. at 673, 94 S.Ct. at 1361, quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 53 L.Ed. 742 (1909). In neither *Kardon* nor *Edelman*, however, had the state procured insurance to cover the loss. The rationale for construing a waiver narrowly is to protect the state treasury, and when a state is insured against the loss from a claim, that rationale is attenuated. Therefore, although a state's insurance coverage does not necessarily imply a waiver of the Eleventh Amendment, the reasoning of *Kardon* may be inapposite in this case. The record does not disclose whether or not Delaware is insured against loss from the type of claim made here. Therefore, we decline to decide whether Delaware has waived its Eleventh Amendment immunity, and we remand the case to the district court to determine if this type of loss is insured and, if so, whether Eleventh Amendment immunity has been waived." *West, supra.*, at 163-164.

It is respectfully submitted that the State has waived its Eleventh Amendment Immunity in the following ways:

B.1 THE STATE OF WEST VIRGINIA HAS, BY STATUTE, WAIVED THE DEFENSE OF SOVEREIGN IMMUNITY TO THE EXTENT THAT ANY CLAIMS FOR WHICH IT MAY BE HELD LIABLE ARE COVERED BY INSURANCE.

West Virginia Code §29-12-5 states, **inter alia,** "Any policy of insurance purchased or contracted for by the [State Board of Insurance of West Virginia] shall provide that the insuror shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits." This language is clear and unambiguous. It is not a directive to counsel for the State of West Virginia in a suit that the State of West Virginia waives its immunity only in State courts or in Federal courts. It is a directive and requirement to the insurance carrier that any policy with the State of West Virginia shall contain such language and such carrier shall not assert the defense of sovereign immunity in or "against claims or suits." This language is clearly sufficient to remove, bar and estop the defense of sovereign immunity in any Court, be it State or Federal. It would be ludicrous to argue that the Legislature of the State of West Virginia was under the naive impression that all civil actions are brought solely in state courts. The federal courts are also frequent and common forums for civil actions. Thus, the language of Code 29-12-5 should not be so narrowly construed as to imply that the Legislature of the State of West Virginia was waiving **only its state constitutional immunity** where insurance is involved. "The primary rule of a statutory construction is to ascertain and give effect to the intention of the Legislature." *Horace Mann Insurance Company v. Shaw*, 337 S.E.2d 908,911 (W. Va. 1985). The West Virginia Legislature was, undoubtedly, aware of the Eleventh Amendment at the time it enacted Code 29-12-5. Had the Legislature intended only to bar and estop the defense of sovereign immunity granted by Article III of the West Virginia constitution, it would have so specified in the statute. By use of the words "constitutional immunity" without limiting the same to mean only State constitutional immunity, coupled with the Legislature's awareness of Federal Courts as frequent and common forums, it is clear that the intent of the statute is to bar the use of State **and** Federal constitutional immunity as a defense where insurance coverage exists.

The Legislature of the State of West Virginia further barred the use of governmental immunity by enacting Section 33-6-14a, West Virginia Code 1931. Said Section states in pertinent part:

> No policy or contract of public liability insurance providing coverage for public liability shall be . . . sold, issued or delivered to any governmental units, agency or subdivision, unless it shall contain a provision or endorsement whereby the company issuing such policy waives, or agrees not to assert as a defense, **on behalf of the policy holder** [State of West Virginia] or **any beneficiary thereof,** [Department] to any claim covered by the terms of such policy within the policy limits, the immunity from liability of the insured by reason of such insured's ... governmental status, unless such provision or endorsement is rejected in writing by the named insured. (Emphasis added)

The above statute clearly bars the use of governmental status as a defense. The Eleventh Amendment is available only to parties claiming governmental status. Thus, the Legislature of the State of West Virginia has waived any defense based upon governmental status, including the Eleventh Amendment, which the State of West Virginia might otherwise have asserted.

The intent of the Legislature to bar the defense of sovereign immunity is further supported by the action of the legislature in amending Section 33-6-14a, effective June 1, 1986, where it deleted language barring the use of governmental status as a defense and, in effect, reinstating the immunity of the State and its agencies.

It is anticipated that the Department will argue that the case of *Pittsburgh Elevator Company vs. West Virginia Board of Regents*, 310 S.E. 2d 675 (W. Va. 1983), holds that Code 29-12-5 does not constitute a waiver of the State's sovereign immunity defense. What cannot be ignored is the fact that Justice McGraw in his opinion couches the action as not being a suit against the State of West Virginia but a suit "where recovery is sought against the State's liability insurance coverage." *Pittsburgh Elevator, supra.*, at 689. The effect of *Pittsburgh Elevator* and the statutes is the same, i.e., when the State has liability insurance coverage, the defense of sovereign immunity may not be asserted. This estoppel not only operates against the insurance carrier in any forum, be it state or federal, in which a law suit against the State of

West Virginia, covered by insurance, is litigated but likewise operates against the State to the extent of the insurance coverage.

The Court in *Pittsburgh Elevator* recognized that the existence of insurance insulates the State Treasury from claims asserted against the State. In viewing the present case as a whole, *Pittsburgh Elevator* is another clear indication by the State of West Virginia that when insurance coverage exists, the constitutional immunity of the State of West Virginia, be it in State or Federal courts, is waived.

Furthermore, the entire concept of sovereign immunity in tort is frowned upon by the West Virginia Supreme Court. "This doctrine of sovereign immunity seems antithetical to the concepts of open access to the courts and due process of law which are basic to our democratic form of government. . . The philosophical basis of our pluralistic society is crippled when the government's power is found to be so absolute that it cannot be made to answer for the wrongs committed in its name." *G. M. McCrossin, Inc. v. West Virginia Board of Regents*, 355 S. E. 2d 32, 34 (W. Va. 1987). The West Virginia Supreme Court in *McCrossin* was asked to overrule, in contract cases, the immunity from suit of the Board of Regents. The Court refused to so overrule such immunity, however, the Court noted that "no claim was made by the appellant against liability insurance coverage of the appellee." *McCrossin, supra.* n. 4.

In comparing the liability of a State in contract actions with tort actions the Court noted "[t]he basic unfairness of invoking the doctrine of sovereign immunity to refuse a remedy for an otherwise actionable injury has long been acknowledged. . . Court after court has noted that where tortious wrongdoing is involved, the fundamental rule calls for liability, and immunity is only an exception to that rule. . . It has also been recognized that the reasons advanced, both historical and modern, for continuing tort immunity are questionable at best." Id. at 38.

The present case is a diversity action and, therefore, the Court should look to West Virginia law in determining the question of whether a waiver has occurred and the Department is estopped from asserting the defense. As stated by Justice Brennan in his dissent in *Atascadero:*

> ...[A] federal court deciding the scope of a state waiver of sovereign immunity should attempt to construe the state law of sovereign immunity as a state court would, making use

of relevant legislative history and legal precedents. Yet, despite the absence of any identifiable federal interest that would justify a departure from state law, the Court eschews any effort to construe California's constitutional waiver requirement in accordance with California law. See, e.g., Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 11 Cal Rpts 89, 359 P2d 457 (1961) (abrogating state sovereign immunity for all tort cases and holding it to be an "anachronism, without rational basis, and exist[ing] only by the force of inertia"). Instead, the Court seems to believe that the Eleventh Amendment justifies the Court in imposing on the state legislatures, as well as Congress, special rules of statutory draftsmanship if they would make a waiver of state sovereign immunity in federal court successful. Apparently, even states that want to make a federal forum available for the fair adjudication of grievances arising under federal law ought to be deterred from doing so... *Atascadero State Hospital v. Scanlon*, 473 U.S. at _____ 87 L. Ed. 2d, at 186 N. 5, 105 S.Ct. 3142 (1985).

The reported decision in *Pittsburgh Elevator* reflects that a petition for rehearing was denied on October 14, 1983. The petition for rehearing was filed by counsel for the West Virginia Board of Regents. The petition asserted that a $300,000 deductible provision applicable to the policy of the Board of Regents plus a "retrospective rating" system, made the State of West Virginia a self-insuror to the extent of the applicable deductable and restrospective rating and therefore, as a result, State funds are directly affected by the Court's decision in *Pittsburgh Elevator*. This action by the West Virginia Supreme Court in denying the rehearing, it is submitted, clearly indicates that even the existence of a "deductible" and/or "retrospective rating" does not remove the bar to asserting the defense of sovereign immunity under Code 29-12-5 and 33-6-14a.

The Department may also argue that *Lumbermens Mutual Casualty Company v. Fugate*, 569 F.2d 213 (C.A. 4th Cir 1978), is controlling in the present action. The holding of *Lumbermens* merely states that the participation in the Federal Aid Highway Act "does not establish consent on the part of a state to be sued in the federal courts..." *Lumbermens, supra.*, p. 214. Furthermore, the action in *Lumbermens* was by the insuror, as subrogee, against the Commonwealth of Virginia to recover for monies paid by the insurer. In the present case, Westinghouse is seeking contribution from the Department's insurance carrier, not from the

Department itself. Thus, *Lumbermens* is not applicable to the present case.

Finally, it is difficult to imagine why an entity would procure insurance coverage with public monies and then attempt to assert its defense of sovereign immunity. Clearly, it is the intention of the State of West Virginia to create a source of funds out of which judgments and valid claims asserted, be they in State or Federal Court, against the State of West Virginia be paid for the various areas of coverage denoted in its policy of insurance.

B.2 THE STATE OF WEST VIRGINIA HAS CONTRACTED WITH ITS INSURANCE CARRIER TO PAY FOR ALL DAMAGES INCURRED AS A RESULT OF THE JUDGMENT RENDERED IN THIS CASE AND THEREBY WAIVED ITS SOVEREIGN IMMUNITY.

The policy of insurance involved in this case contains the provision "[T]he company shall not assert as a defense, on behalf of an insured, to any claim covered by the terms of this policy within the policy limits, the immunity from liability of the insured by reason of such insured's governmental status." This provision is a contractual prohibition, agreed to by the State and the carrier, against the carrier, on behalf of the State from asserting the defense in any legal forum and does not limit the waiver to State Courts.

The State of West Virginia has consistently appropriated funds out of general revenues to reimburse CNA for monies expended in paying claims, defending suits and incurring expenses in connection therewith, and there are no claims which have been denied on the grounds of sovereign immunity. The insurance carrier in this case has already established a reserve for this action. Indeed, it may be that the State of West Virginia has already reimbursed CNA for amounts expended in its defense or for such reserves which have been established to cover potential exposure in this case. If such is, in fact, the case, then the Department's argument that it has not waived its Eleventh Amendment immunity blatantly fails. If any such payment has occurred, the State Treasury has already been affected to the extent of such payments. This action unequivocally expresses the State's intention to waive such defense, otherwise, such payments should never have been made.

The Department may argue that any judgment in the present case would impact the public treasury. The Department would

imply that any action which has any effect upon the State Treasury invokes the Eleventh Amendment defense of sovereign immunity. Such is not the case. Federal Courts may take actions which affect state funds. "The injunction issued in *Ex Parte Young* [209 U.S. 123, 52 L. Ed. 714, 28 S.Ct. 441 (1908)] was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provision. Later cases from the Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex Parte Young.*" *Edelman v. Jordan*, 415 U.S. 651, at 667, 39 L. Ed. 2d 662, at 675, 94 S.Ct. 1347 (1974). **Any impact upon the public treasury has been agreed to by the Legislature of the State of West Virginia when it enacts a Budget Bill containing appropriations for such claims and by a contractual agreement with CNA.**

Westinghouse is entitled to recover the amount of its judgment from this policy. The Department is an insured under the policy, the circumstances precipitating this civil action are covered by the policy, the amount of the claim is within the policy limits, there has been full compliance with all the terms of the policy, and the amount of liability of the insured has been determined per the policy.

SUMMARY

While this petition presents, at first blush, an issue that appears to have been answered by the authorities relied upon by the Circuit Court, it is strenuously urged that this case is clearly distinguishable.

This action is actually against the State's insurance carrier not the State itself, since any recovery will come from insurance proceeds and not state funds.

The existence of comprehensive public liability insurance applicable to the Westinghouse claim, the contractual obligations between the State of West Virginia and its insurance company entered into for the sole purpose of the protection of the public generally, all pursuant to and in compliance with state insurance law and West Virginia Supreme Court of Appeals' decisions interpreting that law show overwhelming implication from such law that there is no room for any other reasonable construction but

that the Eleventh Amendment immunity has unequivocally been waived.

Petitioner respectfully submits that the holding in *Atascadero supra.*, should no longer be controlling where the States have established a source of funds out of which judgments and valid claims asserted against them, whether in State or Federal Courts, be paid. Due to the existence of insurance coverage and the division of the Court in deciding *Atascadero*, the same should be reviewed by this Court to establish its relevancy and application to situations such as in the present case.

CONCLUSION

For the reasons set out herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

John D. Amos
Alfred J. Lemley
William T. Holmes
Counsel for Petitioner

IX. APPENDIX

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A. **Westinghouse Electric Corporation v. The West Virginia Department of Highways,** opinion of the United States Court of Appeals for the Fourth Circuit 2-A

B. Memorandum Opinion and Order of the United States District Court for the Southern District of West Virginia, entered June 8, 1987 ..... 6-A

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2107

Westinghouse Electric Corporation,
a Corporation,

Plaintiff-Appellant,

versus

The West Virginia Department of
Highways, a Corporation,

Defendant-Appellee.

No. 87-2108

Westinghouse Electric Corporation,
a Corporation,

Plaintiff-Appellant,

versus

The West Virginia Department of
Highways, a Corporation,

Defendant-Appellee.

PHILLIPS, Circuit Judge:

This third-party claim for indemnity or contribution against the West Virginia Department of Highways was filed by Westinghouse Electric Corp., a Pennsylvania corporation, as defendant in a diversity tort action arising out of an accident that occurred on a West Virginia state highway. Westinghouse alleged that the Department of Highways had negligently marked the portion of highway on which the accident occurred and that this negligence had caused or contributed to the accident. The district court held the claim barred by the eleventh amendment and dismissed for lack of subject matter jurisdiction. We affirm.

As the district court noted, a claim against the West Virginia Department of Highways is, for eleventh amendment purposes,

properly considered one against the state itself. **See, e.g.,** *Florida Dept. of Health v. Florida Nursing Home Assoc.*, 450 U.S. 147 (1981). Because the eleventh amendment is a jurisdictional limitation on the power of the federal courts, it applies to claims based, as is this one, on state rather than federal law. **See** *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) *(Pennhurst II)*. Westinghouse argues, however that the eleventh amendment does not bar this claim because the state of West Virginia has waived its eleventh amendment immunity for all claims that fall within the scope of its liability insurance coverage. We disagree.

A state may waive its constitutional immunity and consent to suit in federal court, and when it does so, the eleventh amendment will not bar the action. **See** *Clark v. Barnard*, 108 U.S. 436, 447 (1883). A state may only be held to have waived its immunity in one of two ways: (1) directly by statutory or constitutional provision, **see** *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), or (2) "constructively," by voluntarily participating in a federal program when Congress has expressly conditioned state participation in that program on the state's consent to suit in federal court, **see id.** at 246-47. **See generally id.** at 238 n.1. Neither means of waiver can be found here.

Because the eleventh amendment protects the state specifically against suit in federal court, **see** *Pennhurst II*, 465 U.S. at 99 ("A State's constitutional interest in immunity encompasses not merely **whether** it may be sued, but **where** it may be sued."), a state's general waiver of sovereign immunity will not suffice to waive the immunity conferred by the eleventh amendment. *Atascadero*, 473 U.S. at 241. Instead, a state statutory or constitutional provision will constitute a waiver of eleventh amendment immunity only if it contains an "unequivocal" statement of the state's intention to subject itself to suit **in federal court. Id.; see** *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *Smith v. Reeves*, 178 U.S. 436, 441 (1900).

Application of the stringent *Atascadero* test to this case reveals Westinghouse's claim of waiver to be without merit. The West Virginia Constitution contains no provision subjecting the state to suit in federal court. Indeed, the state constitution specifically provides that "[t]he State of West Virginia shall never be made defendant in any court of law or equity, . . . except [if any] garnishment or attachment proceeding, as garnishee or sugges-

tee." W. Va. Const. art.VI, § 29-12-5, which requires all insurance policies purchased for the state or its agencies or departments to contain a provision by which the insurer agrees not to raise the "constitutional immunity" of the insured as a defense to third-party claims.[1] Second, Westinghouse cites W. Va. Code § 33-6-14a, which at the time of this accident required **all insurance policies** issued to governmental units to contain a provision by which the insurer agreed not to assert the insured's "governmental status" as a defense to third-party claims.[2]

These provisions can, at most, be construed as waiving the state's immunity from suit in **state** court. Neither contains the "unequivocal" statement of the state's intention to subject itself to suit in **federal** court required by *Atascadero*, even assuming the legislature had the power under state law to do so.

Westinghouse has two additional arguments in support of its claim of waiver, neither of which meets the stringent *Atascadero* test. First, it argues that a waiver of eleventh amendment immunity may be implied to the extent the state is insured against the loss from a claim, on the ground that the fundamental purpose of the immunity doctrine is to protect the public treasury. Westinghouse cites, in support of this argument, a pre-*Atascadero* case,

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[1]Section 29-12-5 lays out the duties of the State Board of Insurance, which is charged with responsibility for obtaining insurance for all state property, activities, and responsibilities. The statute provides, in relevant part:

> Any policy of insurance purchased or contracted for by the board shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the state of West Virginia against claims or suits: Provided, That nothing herein shall bar the insurer of political subdivisions from relying upon any statutory immunity granted such political subdivisions against claims or suits.

[2]At the time of the accident involved here, Section 33-6-14a provided:

> No policy or contract of public liability insurance providing coverage for public liability shall be . . . sold, issued or delivered to any governmental unit, agency or subdivision, unless it shall contain a provision or endorsement whereby the company issuing such policy waives, or agrees not to assert as a defense, on behalf of the policyholder or any beneficiary thereof, to any claim covered by the terms of such policy within the policy limits, the immunity from liability of the insured by reason of such insured's . . . governmental status, unless such provision or endorsement is rejected in writing by the named insured.

Act of March 4, 1967, ch. 95, 1967 W. Va. Acts 448 (amended 1985 and 1986).

West v. Keve, 571 F.2d 158, 163-64 (3d Cir. 1978) (suggesting that waiver of eleventh amendment immunity may, under certain circumstances, be implied from existence of insurance coverage). In addition, Westinghouse suggests that a waiver of eleventh amendment immunity may be implied from evidence that the state of West Virginia has in the past voluntarily paid tort claims which are, like this claim, for amounts under $500,000.

Neither of these theories of waiver by the state falls within the narrow scope of that doctrine as recognized by the Supreme Court. **See** *Atascadero*, 473 U.S. at 238 n.1.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

WESTINGHOUSE ELECTRIC CORPORATION,

Plaintiff,

vs.

CIVIL ACTION NOS. 84-2296 and 84-2297

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending is the Defendant's motion to dismiss made the morning of trial on March 25, 1986. This case originally arose as a third-party action from a suit filed by San C. Shields and Norman E. Sartorius and others against Westinghouse. Shields operated the pickup truck in which Sartorious was a passenger on the West Virginia Turnpike when Shield's pickup truck collided with a tractor trailer truck operated by an agent of Westinghouse. Shields and Sartorius filed suit in the United States District Court against Westinghouse and Westinghouse filed a third-party complaint against the West Virginia Department of Highways. Shields and Sartorius settled their claim with Westinghouse and on March 25, 1986, Westinghouse and the West Virginia Department of Highways went to trial on whether the Department of Highways was negligent in marking the West Virginia Turnpike and if so, what percent of fault the Department of Highways' negligence played in the Shields and Sartorius accident. Upon hearing the evidence, the jury returned a verdict finding the West Virginia Department of Highways 85% at fault.

The day prior to trial, after a final settlement conference, counsel for the West Virginia Department of Highways informed the Court and counsel for Westinghouse Electric Corporation that the West Virginia Department of Highways intended to rely on the Eleventh Amendment in defense of Westinghouse Electric Corporation's action. The motion was formally made on the record the morning of trial prior to the introduction of any evidence. The Court took the motion under advisement and pro-

ceeded to trial. The Court now considers the Department of Highways' assertion that this Court lacks jurisdiction under the Eleventh Amendment to the United States Constitution.

That amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The limitation of judicial power provided for in the Eleventh Amendment is also considered to apply to suits by citizens of a state against which the action is prosecuted. *Hans v. Louisiana*, 134 U.S. 1 (1890).

It is conceded that for the purposes of the Eleventh Amendment, an action against the West Virginia Department of Highways is no different from one against the State of West Virginia itself. *Florida Department of Health v. Florida Nursing Home Association*, 450 U.S. 147 (1981). Westinghouse asserts that the State of West Virginia has waived its right to rely on the Eleventh Amendment and has consented to suit in federal court.

In determining whether a state has waived its Eleventh Amendment immunity, waiver should be found only by express language or by such overwhelming implications from the text of laws as will leave no room for any other reasonable interpretation. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). The standard has been stated in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), as follows:

> "The test for determining whether a state has waived its immunity from federal court jurisdiction is a stringent one. Although a state's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment. [Citation omitted.] As we explained just last term, 'a state's constitutional interest in immunity encompasses not merely **whether** it may be sued, but **where** it may be sued.' [Citation omitted.] Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the state's intention to subject itself to suit in **federal court.** [Citations omitted. Emphasis in original.]" 473, U.S. at 241.

This immunity is not waived by a failure to assert at the trial court level. *Edelman v. Jordan*, 415 U.S. at 677-78; *Jackson v. Hayakawa*, 682 F.2d 1344, 1351 n. 5 (9th Cir. 1982). Absent statutory authority, attorneys representing the state are not empowered to waive the immunity. *Dagnall v. Gegenheimer*, 645 F.2d 2 (5th Cir. 1981). Westinghouse, upon discovery for the purposes of this motion, reveals that West Virginia has without exception paid claims not exceeding $500,000, such as the claim involved here, that it has entered into a contract with its insurance company by which the insurance company agrees not to raise defenses based upon the State of West Virginia's "governmental status" and for the purposes of this motion, the Court assumes that the State of West Virginia has already paid over to its insurance carrier a reserve to cover the loss anticipated from this action. Westinghouse further relies upon *W.Va. Code*, § 29-12-5 which requires insurance carriers to issue policies containing provisions agreeing not to raise defenses based upon the insured's governmental status and two West Virginia Supreme Court of Appeals cases, *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 310 S.E.2d 625 (W.Va. 1983) and *G. M. McCrossin, Inc. v. West Virginia Board of Regents*, 355 S.E.2d 32 (W.Va. 1987), each of which is a statement by the Supreme Court which articulate its dissatisfaction with the continuing validity of sovereign immunity.

The Court has reviewed carefully these laws and facts offered by the Plaintiff to demonstrate consent or waiver and has further considered the Third Circuit case *West v. Keve*, 571 F.2d 158 (3d Cir. 1978). Westinghouse proves a general waiver of sovereign immunity and reasons that because the general waiver is not limited to just state courts, it unequivocally points to a waiver of immunity to suit in federal court as well. In accord is *West v. Keve* insofar as insurance applies to cover the loss which would otherwise drain the State's treasury. The correct legal standard is stated in *Atascadaro* which requires a specific statement of intention to subject the state to suit in federal court. The Court can find no state constitutional provision, statute or state judicial proclamation which indicates consent to subject the State of West Virginia to suit in federal court. All that is demonstrated is a general waiver of sovereign immunity, and this is not enough to waive immunity guaranteed by the Eleventh Amendment.

The rationale in *West v. Keve* that the presence of insurance obviates the need for Eleventh Amendment protection cannot stand as controlling precedent in the face of the more stringent standards of *Atascadero* maintaining the Eleventh Amendment barrier, unless expressly waived.

Finally, the late hour at which the Department of Highways raised its Eleventh Amendment defense cannot invest this Court with jurisdiction inasumuch as this Court never has acquired jurisdiction under the standards of *Atascadero*.

This Court being without subject matter jurisdiction, the Defendant's motion to dismiss is granted and the Plaintiff's complaint, originally filed as a third-party complaint, is dismissed without prejudice.

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

ENTER: June 8, 1987

Charles H. Haden, II, Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

WESTINGHOUSE ELECTRIC
CORPORATION,

Plaintiff,

vs. CIVIL ACTION NOS.
84-2296 and 84-2297

THE WEST VIRGINIA DEPARTMENT
OF HIGHWAYS

Defendant.

JUDGMENT ORDER

This matter having come before the Court on the Defendant's motion to dismiss, and the issues having been duly considered and a decision having been duly rendered, it is ORDERED and ADJUDGED:

1. That the Plaintiff's complaint be dismissed without prejudice;

2. That the Clerk remove this action from the active docket of this Court.

The Clerk is directed to send a certified copy of this Judgment Order to counsel of record.

ENTER: June 8, 1987

Charles H. Haden II, Chief Judge